

A CALFED Joint Powers Authority

Summary of Issues

With the contract among CALFED's state and federal agencies expiring in May 1999, CALFED staff has set out two tasks to ensure CALFED's continued operation -- extending the agency contract and streamlining CALFED's functions into some new organizational format. To accomplish the streamlining, the staff has proposed creating a joint powers authority (JPA), pursuant to California's JPA statute. While using California's JPA statute may be appealing in its simplicity, effective use of a JPA structure would more likely require both state and federal legislation, due to a number of complex issues engendered by the nature of CALFED. This memorandum will identify some of the obstacles to creating a CALFED JPA and describe options for legislation to overcome those obstacles.

Creating a JPA that includes both state and federal agencies raises a number of novel legal issues, including how to structure the JPA's authority, duties, governance and financing. We have not identified any other example of a JPA that fully incorporates state and federal agencies into its structure. The agencies that include participation from both state and federal agencies are either state agencies with federal funding and advice, or federal agencies with state cost-sharing and cooperation.

Our analysis starts with the California statute, which allows government entities to "jointly exercise any power common to the contracting parties." The government agencies therefore need authority from each agency's governing body and a common set of powers that the agencies wish to exercise jointly. Those basic requirements, in combination with CALFED's state-federal character, lead to the following issues:

Authority. While the state agencies may have authority to join a JPA, federal law requires specific legislation before any federal agency can acquire a corporation, such as joining a JPA, to act on its behalf. In addition, federal ethics and conflict of interest laws constrain federal employees from acting or advocating on behalf of another organization, such as a state-created JPA. To overcome these hurdles, the State Legislature and the Congress could craft special legislation ranging from authority to join a state JPA (with exceptions for federal employees who work with the JPA) to creation of a federal agency with state representatives on the governing board.

Duties. The question of the JPA's duties raises both legal and policy issues. On the legal side, the California statute allows agencies to exercise only "common" powers. Considering the diversity of CALFED agency functions and authorities, the breadth of common powers ultimately may be quite narrow. While the California Attorney General interprets "common" powers broadly, federal agencies generally have more narrowly defined powers. State and federal legislation therefore would be needed to identify the duties of this joint entity, based on policy recommendations from CALFED agencies.

Governance. The California statute establishes the method for governing a JPA, with each agency having a vote on the governing board. In effect, this structure would continue the decision process that CALFED now uses. It would, however, exclude non-government stakeholders and agencies who are not part of the JPA (e.g. local water agencies). State and federal legislation could establish any one of a wide range of governance structures.

Finance. One of the key goals of the CALFED staff is for CALFED to have control of its own finances. Recent discussions regarding use of \$85 million appropriated to the Department of the Interior for Bay-Delta programs have highlighted the importance of resolving this issue. Currently, one of the contract administrators (DWR or USBR) must receive appropriations and issue checks to pay CALFED expenses. The independent financing issue includes at least two sub-issues: independent revenues and independent expenditures.

Identifying and obtaining an independent revenue stream involves overcoming significant barriers -- legal and political. Under California law, the state Constitution imposes significant limits on state and local government revenues. While Congress may face fewer Constitutional barriers in creating revenue streams, its willingness to impose new taxes or charges may be limited by other factors. In any case, legislation would be required to either redirect a revenue stream now received by one or more of the CALFED agencies, or create a new charge for beneficiaries of the CALFED program (e.g. acre-foot charge on exports).

As to the expenditure control issue, creation of any new organization -- JPA or otherwise -- would allow for day-to-day control of expenditures. The limits on that control would take the form of oversight from the federal or state funding agencies. If the JPA wished to receive direct federal appropriations without agency oversight, it would need to be, in some form, a federal agency. In effect, oversight would be transferred from federal agencies to the Congress.

Just as Bay-Delta issues interrelate, this finance issue relates closely to the authority issue described above. In addition to identifying such connections, this memorandum provides a broad overview of the large issues that require resolution in order to create a JPA. If the CALFED agencies choose to pursue legislative authority to create such an entity, then a myriad of smaller issues will require further discussion and resolution as the legislative effort proceeds.